

T H E  
A R G U M E N T  
O F A  
L e a r n e d C o u n s e l,  
U P O N A N  
A c t i o n o f t h e C A S E

Brought by the  
*East-India-Company,*

A G A I N S T  
M r . *Thomas Sands*, an I n -  
t e r l o p e r .

---

L O N D O N :

Printed, for B. *Aylmer* at the  
*Three Pigeons* in *Cornhill*, 1696.

T H E

# ARGUMENT

O F

Tested Council

W I T N E S S

Attest of the Court

in the year of our Lord

1700

the 10th day of June

1700

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De Termino Paschæ, Anno xxxvi.  
 Caroli II. Regis : In Banco  
 Regis.

Gubernator & Societas  
 Mercator' de London in Oriental' Indi-  
 am negotiant' } against Tho. Sands.

**A**N ACTION upon the Case, where-  
 in the Plaintiff declares, That,

Our Lord the King, by his Letters <sup>3. Apr.</sup>  
 Patents, reciting that the Company <sup>13 C. II.</sup>  
 of Merchants trading to the *East Indies*,  
 have been long a Corporation, and en-  
 joyed divers Liberties and Privileges,  
 by divers Grants from Queen *Elizabeth*  
 and King *James*.

That the King was informed, that  
 divers Inconveniencies and Disorders  
 were committed, to the Prejudice of  
 the Company ; at the Petition of the  
 Company, the King grants, ratifies,  
 and confirms to the Governour and

Company of Merchants of London,  
trading to the *East Indies*,

That they should for ever be a Body-  
Politique by the Name of *Gubernatoris & Societatis Mercator' de London in Oriental' Indiam negotiant'*.

*Ac eos per Nomen Gubernatoris & Societatis Mercator' in Oriental' Indiam negotiant' Unum Corpus Corporal' & politicum in facto & nomine realiter in perpetuum fecit, ordinavit, constituit, stabilivit, & declaravit per Literas Patentes illas.*

With Powers to purchase, sue, and be sued by the Name of Governor and Society of Merchants of London, &c.

And that they, and all those that then were, or should be of the said Company; and all their Sons at their Ages of 21 or more; and all their Apprentices, Factors, and Servants, who should be employed by the Company, in the said Trade, to the *East Indies*, beyond the Seas, might traffick and use the Trade of Merchandize by Sea, by the Passages and Ways



Ways discovered to the *East-Indies*.

Beyond the Cape de *Bona Speranza*, unto the Straits of *Magellan*, in such Order, Manner and Form, Freedom and Condition, as from time to time, at any publick Assembly or Court, holden by or before the said Governor and Company; by or betwixt them of the said Company, or the greater Part of them present at such Assembly or Court, shall be limited or agreed, and not otherwise; any Diversity of Religion, notwithstanding; so as the Trade be not with any Christian Prince or State in League with our King, who shall not accept of their Commerce, but refuse to accept the same.

And that the Company, their Factors, Servants, and Assigns in the Trade of Merchandize, shall for ever have the whole and sole Trade and Traffick, and the whole Freedom, Use and Privilege of trading and merchandizing, to and from the *East-Indies*,

*dies*, in such manner as before mentioned.

And that the *East-Indies*, or the Isles and Places thereof, shall not be used or haunted by any of the King's Subjects, against the true Intent of the Letters Patents.

And by the same Letters Patents, the King commands all his Subjects, that none of them shall visit or frequent, or trade in the *East-Indies*, unless with the Licence and Agreement with the Company, first had under their common Seal.

That by Vertue of this Patent, the Plaintiffs have been, and still are a Corporation, trading to the *East-Indies*, with the Inhabitants thereof; who, at the Time of the Letters Patents granted, were not, nor yet are Christians, nor Subjects of any Christian Prince or State, but Infidels, Enemies, and Adversaries of the Christian Faith: And that their Trade hath been to the Profit of the whole Kingdom, and Encrease of the King's Customs. That this Trade cannot be carried on but by a Company or Body Politick.

And

And that from the making the Letters Patents, they have had, and ought to have had the sole Trade there.

That the Defendant *Sands*, being a Subject of the King's, but no Member of the Company, nor being Son, Factor, Apprentice, or Servant, or Assignee after the Letters Patents (*vix.*) 19 Jan. 34. Car. nunc, to the East-Indies, beyond the Cape de Bona Speranza, and this Side the Straits of Magellan, in certain Places called *Atcheon*, *Mecklapaton*, and *Porto Novo*, with a Ship called the *Expectation*, hath traded and merchandized.

And divers Wares in the said Ship, to these Places transported, there bargained and sold, and other Merchandize there bought, and into this Kingdom Imported, without the Licence, and against the Will of the Company, *in eorum præjudicium & depauperationem manifestam*, and against the Form of the Letters Patents, *ad damnum* of the Company, 1000 l.

*Plea.* The Defendant demands Oyer of the Letters Patents, which are set forth *in hac verba.* And thereby,

after the naming the Governour, the 24.  
and constituting a general Court of Assem-  
bly, and the Powers of Elections of their  
Officers.

That the King doth grant, as in the  
Declaration, so far as there mentioned.

But then in the Clause of Grant of  
sole Trade, at the End thereof, they  
have omitted this,

And that the said Governour and  
Company, and every particular  
and several Person that now is,  
or hereafter shall be of the Com-  
pany, shall have full and free  
Liberty and Licence, in form  
aforesaid, to and from the said  
*East-Indies*, according to the Or-  
ders, Ordinances and Agree-  
ments hereafter to be made at their  
publick Courts.

In the Recital of the Clause prohi-  
biting others to trade without Licence  
under the common Seal, they leave out  
a Part of that Clause, which is this.

Upon Pain that every such Person that  
shall trade to or from the *East-Indies*, shall incur the Forfeiture  
of his Merchandize he shall bring  
into the King's Dominions, con-  
trary

trary to the Purport of this Charter; or which the Company shall find in the *East-Indies*, where they traffick; and also of the Ship wherein the Merchandizes are transported, one half to the King, the other to the Company, and Imprisonment of the Offender.

Then follows a Clause of Grant.

That the Company, for any Consideration or Benefit to be taken to their own Use, may grant Licence to any Stranger or other, to trade to or from the *Indies*.

Then the King grants to the Company,

That the King will not, without the Consent of the Company, give Licence to any to or from those Places.

Then there is a Clause,

That none of the Company shall have a Vote in the general Assembly, unless he have 500  $\text{\textit{l}}$ . in the Stock.

And after Oyer, the Defendant pleads the Statute of the 5 E. 3. c. whereby 'tis enacted,

‘ That

‘ That the Seas shall be open for all  
 ‘ Merchants to pass with their Mer-  
 ‘ chandizes wherever they please.

And that he, by Vertue thereof, did  
 trade as in the Declaration alledged,  
*prout ei bene licuit.*

*To this the Plaintiff hath demurr’d.*

Before I come to state the Points and  
 Questions, upon which this Question  
 truly depends ; I desire to shew what  
 are not the Points or Questions in this  
 Case.

1. It is not the Question, whether the  
 King, by Law, can restrain any of his  
 Subjects to go out of the Kingdom.

For the King may so do, and this  
 without Distinction of Christian or In-  
 fidel Country, *pro hic & vunc*, as Oc-  
 casion may be.

2. It is not the Question, whether  
 the King can restrain all his Subjects to  
 such a Country or City.

It may be done upon particular Oc-  
 casions, as of War or Plague.

But from hence to argue, that the  
 King can grant you and your Succes-  
 sors for ever, a sole Trade to such a  
 Country or Place, excluding all other  
 his

his Subjects, except with your Leave or Licence : Because he can restrain this or that Subject, therefore he can grant a sole Trade to the Plaintiff, and exclude all others, but you, and such as you, licence for ever : Because he can, upon particular Occasions, as of War or Plague, restrain or prohibit his Subjects to go or trade to such a City or Country : That when there is neither Plague nor War, the King should grant a sole Trade to any particular Person, whether Body Politick or Natural, and restrain all others for ever.

Can this be by the Law done?

If this Foundation will warrant it, though in this Case this be with Infidels ; and upon that ground, some difference imagined betwixt an Infidel and a Christian Country: Yet remember your Reason or Foundation doth not distinguish or make a Difference.

For if because the King hath Power to restrain or prohibit Subjects to go out of the Realm : Or by Occasion of War or Plague, all his Subjects from trading to such a City or Country ; since this Power (you must agree) extends as well to Christian as Infidel City or Country ;

The

The granting of sole Trade to one Subject or Body Politick, and restraining all others, is the same; whether it be to Christian or Infidel City or Country.

And when you cite the of Statute 3 Jac. 6. which enacts,

'That the King's Subjects shall freely trade to *Spain* and *Portugal*, notwithstanding the Charters of Incorporation granted to some Merchants, and the Prohibitions in those Charters:

And from thence argue, that because there were Prohibitions or Restraints by Charters, as to those Countries which were Christian, therefore such a sole Trade to an Infidel Country is well granted:

You must have it admitted, that such a Grant to those Countries is good and legal; or else you argue from that which you grant not to be lawful, to prove another like Grant to be lawful. Or at least by the same Arguments and Reasons maintain such a Grant of sole Trade to be good, whether made to Christian or Infidel Country.

If then it not being the Point or Question in this Case,

Whe-



Whether the King can restrain his Subjects from going beyond the Seas?  
Nor,

Whether the King can lawfully restrain his Subjects to trade to a particular Country or Place, whether Christian or Infidel?

Then the Questions plainly and shortly are,

1. Whether this Grant of sole Trade to the Plaintiffs, be a good Grant or not?

2. Supposing that it should be, then whether this Action be maintainable or not?

1. By the Common Law, Trade is free and open for the King's Subjects. And this I shall endeavour to shew from Authorities.

*Commercium jure Gentium commune esse debet & non in Monopolium & privatum paululorum questum convertendum. Iniquum est, aliis permittere, aliis inhibere Mercaturam.* 3 Inst. 381.

The Taylers of Ipswich's Case, 'That  
'no Trade, Mechanick nor Merchant, 1 Rols Rep.  
'can be hindered by the Patent of the <sup>4</sup>  
'King; a Patent that only 100 Persons  
shall use such a Trade, is void.

Note,

**F.N.B. 85.** Note, that by the common Law, every Man may go out of the Realm for Merchandize, or travel without demanding Leave of the King.

Stat. 5R. 2.c. 2. Prohibited all but Great Men and Merchants to pass out of the Realm without the King's Licence: But this Statute is repealed by 14 Jac. c. 1.

**Dyer, 165.** That every one may, at his Will, go-with his Goods; and cites *F. N. B.* for it.

2. And in the next place, That appropriating Merchandize and Trade to a particular Person or Persons, or a Body Politick, excluding others, is an ingrossing such Trade: And that all ingrossing Trade is against the common Law.

3 Inst. 196. That ingrossing any sort of Merchandize is an Offence at common Law.

**Dom' Rex**  
**verf. Crisp.**  
**& al.** In this Court lately, an Agreement betwixt divers Coprice Makers and Coprice Merchants, for the buying of all Coprice, that the Coprice Makers should, for three Years, make at so much a Tun, and restraining them from selling to any others.

Adjudged an ingrossing upon an Information in this Court.

And if a Company of Merchants should buy up, in like manner, all the Merchandize of *Spain* or *Portugal*, or the *Canaries*, or other Town or Place for three Years to come : This I think would be an ingrossing, and the Contract against Law.

For the Consequence of it must be, that they would sell at their own Price, and thereby exact upon the King's Subjects. And your Patent, for the sole Trade to the *East-Indies*, invests you in all the Merchandizes of those Countries, and ingrosseth them all into your Hands.

And if a Patent grant to any the ingrossing of Merchandizes ; this Patent is against Law, and void. Ingrossing is in Truth but a Species, or another Name for monopolizing ; for all the Difference between them is, that ingrossing is commonly by Agreements and Contracts made betwixt Subjects one with another, without the King's Grant ; but Monopolies are Ingrossings by Colour of the King's Grants.

The

3 Inst. 181.

The Case there of *John Peachy*, who 50. E. 3. was severely punished for a Grant under the Great Seal, for the sole selling of sweet Wines in *London*.

Case of  
Monop. 11  
Rep. 84.  
Moör.  
673. and  
in Noy.

This was ingrossing by Colour of the King's Grant, and a Monopoly.

*Darcey* had the sole importing from beyond Seas, and selling of Cards, granted him by Patent for 21 Years, under a Rent, prohibiting all others to sell; and this, *Trin. 44. Eliz.* adjudged a void Grant.

And the Statute, 21 *Jac. c. 3.* declares all Monopolies to be against the common Law. So that this being so; If this Grant be a Grant to you, to ingross or monopolize, then by the common Law this Grant is void.

9 H. 3.  
Mag. Ch.  
c. 30.

3. That that this Grant of sole Trade is against *Magna Charta*, and divers other the ancient Statutes.

' All Merchants (if they were not  
' openly prohibited before) shall have  
' their safe and sure Conduct to depart  
' out of *England*, and to come into  
' *England*, to buy and sell without any  
' manner of evil Tolls, by the old and  
' rightful Customs, except in Time of  
War.

My

My Lord Cook saith, 'That the <sup>2</sup> Inst. 57.

Words in this Act [ *nisi publice prohibeantur* ] are intended a Prohibition by the publick Council of the Kingdom by Act of Parliament.

This Act then being general, all Merchants to have safe Conduct, to go out, and come into *England*, if not prohibited by Act of Parliament, is probably a Declaration of the common Law.

Stat. 2 E. 3 c. 'That all Merchants Strangers and Privy, may go and come with their Merchandizes into *England*, according to the Form of the Grand Charter.

Stat. 9 E. 3 c. 1. 'That all Merchants Strangers and Denizens, and all other, and every of them, of what Estate soever they be, shall sell their Merchandizes, from whencesoever they come, freely, without Interruption: Except the King's Enemies. And that this Act shall be observed and performed notwithstanding any Charters to the contrary. And that Charters to the contrary are of no force, but are to the King's Damage, and to the Oppression of the Commons.

But your Charter gives you the sole Merchandizing to and from the *East-Indies*.

Stat. 14 E. 3. c. 2. Recites *Magna Charta*, and enacts, 'That all Merchants, Aliens and Denizens may, without Let, safely come with their Merchandizes, safely carry, and safely return.

Stat. 25 E. 3. c. 2. Confirms the former Statute of 9 E. 3. and enacts, 'That if any Letters Patents, Proclamation or Commandment be made to the contrary, it shall be void.

Stat. 2 R. 2. c. 1. and 11. c. 7. Both confirm the two former Statutes, and enact, 'That all Letters Patents, and Commands to the contrary, shall be void.

By these four Statutes, the Freedom of Trade and Traffick is amply establish'd, and all Letters Patents, Grants, Proclamations, and commands to the contrary made void, if they had not been so at common Law.

2 Inst. 63. And my Lord Cook, upon Consideration of *Magna Charta*, and these Statutes, after Examination of several Grants of Tolls and Duties to be paid upon

upon Merchandize, saith, ' That upon  
 ' this Charter this Conclusion is neces-  
 ' sarily gathered, that all Monopolies  
 ' concerning Trade and Traffick, are  
 ' against the Liberty and Freedom de-  
 ' clared and granted by this Great  
 ' Charter, and divers other Acts of Par-  
 ' liament, which are good Commenta-  
 ' ries upon this Charter.

And then cites the other Statute that  
 I have before cited.

*Object.* But say they, tho we have  
 the sole Trade, yet we are no Mono-  
 poly.

*Resp.* To prove it to be a Monopoly, <sup>3 Inst. 181.</sup>  
 let us see how a Monopoly is described.

My Lord Cook, in his Chapter of  
 Monopolies describes it; *An Institution  
 or Allowance by the King's Grant to any  
 Person or Persons, Bodies Politick or Cor-  
 porate, of or for the sole buying or selling,  
 or using of any thing, whereby any Per-  
 son or Persons are to be restrained of any  
 Freedom or Liberty that they had be-  
 fore, or are hindered in their lawful  
 Trade.*

This Description, I think, exactly  
 suits with your Patent. For,

1. By your Patent you have the sole Trade granted to you.

Sole Trade is sole buying and sole selling: for Merchandizing consists in buying and selling.

The sole using any thing, is another general Part of this Description. Is not sole Trade, sole using or merchandizing?

And for the latter Part of it, whereby any Person is restrained or hindred in his Liberty,

2. Your Patent grants to you to seize the Ships and Goods of any that come thither.

And your bringing this Action, shews you are sufficiently a Hinderer of the Liberty of others to trade.

So that I think you can't deny but that you are comprehended under this Description.

But for further Evidence of its being a Monopoly, let us see what the Evils and Mischiefs are that were in Monopolies which the Law speaks so hard of.

The Evils and Mischiefs are:

First, That the Price of the Commodity they sell, shall be kept and risen



risen higher than otherwise it would be.

For, he that hath the sole Trade, will keep up the Price as he pleaseth. And this is one of the Evils mentioned in the Case of Monopolies, 11 Rep. 86.b.

The Truth hereof I think is evident enough, and no Man in Reason thinks but he that hath the sole Trade, trades for his Advantage : And the highest and dearest Rates he can sell at, and the cheapest he can buy at, are his Advantage.

Secondly, A second Mischief or Evil is, that Monopolies or sole Trade is *pro privato paululorum questu*. So it is said to be in the Margent of the Book before cited, 3 Inst. 181.

No Man will doubt hereof, that considers the present State or Condition of this Company.

Thirdly, Another Evil or Mischief of Monopolies or sole Trade, is the Impoverishment and Oppression of the King's Subjects.

Trade is not in its own Nature fix'd and stable, but varying and altering, sometimes better, sometimes worse. Sometimes one Trade beneficial, ano-

ther not ; according as Wares, Sick-  
nesses, Scarfity of this or that sort of  
Commodity or Merchandize in this or  
that Country; Modes, Fashions, Cu-  
stoms and Habits of Men do occasion.

And the Merchants, by their Edu-  
cation and Observation, manage and  
govern this Trade, for the Mainte-  
nance of themselves and their Families,  
and the general Good of Men. And  
direct and imploy their Estates, and  
traffick into this or that Part of the  
World, as Time and Occasion shall  
give them best Encouragement.

But sole Trade into this or that Part  
of the World, granted to one Compa-  
ny, and of another to another, sets up  
the particular Men that head the  
Companies, but destroys all other Mer-  
chants and inferior People.

Such Patents must undo all other  
Parts of this Kingdom besides *London*.  
For, the Companies can't drive these  
great Trades, but must manage them  
in *London*, and consequently, the other  
Parts of the Kingdom, must be exclu-  
ded. All shipping must be subject-  
ed to the Rates and Prizes these Ap-  
propriators of Trade, will give them ;

or

or else lye still and be destroyed. And so must all Masters of Ships, Mariners; all Artificers, Labourers, Factors, and Servants, whose Employments depend upon these Trades, must all be subjected to their Wills.

And of how great Consequence that may be, deserves Consideration.

The Instances of your Oppressions and Dealings with your Factors, Captains, Servants, and Seamen that got any thing in their Service, are well known.

So that if the Evils and Mischiefs which the Common Law forbids and endeavours to prevent, by judging all Monopolies, Ingrossings, and sole Trade unlawful, be to be avoided; The Evils and Mischiefs attending your Patent and sole Trade, are perhaps the greatest, because your sole Trade is the greatest that ever England knew.

That every Grant of the King hath F. N. Br. this Condition implied in it, *viz.* 222.

*Quod Patria per talem donationem magis solito non oneretur seu gravetur.*

*Grant le Roy al charge ou prejudice del* 1; H. 4. 14.  
*Subject est void.*

And if the Evils and Mischiefs of this Grant be as I have stated them ; 'Tis a Grant to the Oppression and Prejudice of the Subject : And therefore the King is deceived in it, and the Grant by the common Law void, as I have before shewn.

*Object.* But perhaps it may be objected, that this Patent is granted for good Government and Order, and Preservation of this Trade, which will otherwise be destroyed, and for the Good of the Kingdom : And there have been in all Times such Patents, as to *Turky, Barbary, Guiny*, and others.

*Resp. 1.* Remember what our Books say.

3 Inst. 540.

That new Corporations, trading to foreign Countries, under the fair Pretence of Order and Government, in Conclusion, tend to the Hindrance of Trade and Traffick, and in the End, prove Monopolies.

11 Rep.  
88. b.

In the End of the Case of Monopolies. *Privilegia quæ revera sunt in præjudicium Reipublicæ, magis tamen speciosa habent Frontispicia & boni publici prætextum, quam bonæ & legales concessiones.* But *prætextu liciti non debet admitti illicitum.* The Words of that Book. And

And there also it appears, and is taken notice of, that *Darcie's* Patent had a glorious Preamble, *viz.*

That the Subjects might exercise their Husbandry and lawful Employments, and not be corrupted to Idleness by the wicked thing called Cards, the sole Sale and Trade of Cards is granted to *Darcey*.

Observe, says the Book, what a glorious Preamble and Pretext this odious Monopoly had.

That Patent which (made 3 Years after this, and dated 17 of *March*, 17 *Car. 2.* in Imitation of this ) erected the *Canary* Company, and granted them the sole Trade, Recites, That the Trade to the *Canaries*, was of greater Advantage to the King's Subjects formerly, than at that Time : That by reason the too much Access and Trading of Subjects thither, our Merchandizes were decreased in their Value, and the Wines increased to double Value ; so that the King's Subjects were forced to carry Silver and Bullion there to get Wines.

Horn and  
Ivy, Mich.  
20. B. 2. C.  
403.

And that all this happened for want of Regulation of Trade.

And

And thereupon the Patent constituted Sir *Arthur Ingram*, and about 60. Persons more by Name, and all others of the King's Subjects, Merchants or Factors, trading, or that had within seven Years, traded to those Islands, to the Value of 1000 *l. per Annum*, and all others that after should be admitted should be a Body Politick.

That there should be a Governor, a Deputy Governor, 12. Assistants, and names them; but to be continued by Election.

That they should have the sole Trade to these Islands. And that none other should haunt or visit those Islands, under Pain of Forfeiture and Imprisonment: With *non obstante* to the Statute of Monopolies.

Judgment was given against this Patent.

Here is in this Case, the same Pretence and Preamble, as in yours. The Abuse of the Trade, and the Regulation of it, for the general good was the thing pretended, but few Men doubt what was intended.

Under the Name of Regulation and Government, to ingross all into the  
Hands

Hands of 10 or 12 Men, is most excellent Regulation and Government.

*Resp.* 2. And as to other Companies and Charters that have been granted.

Supposing that all these Grants were such as this, and practised and used as this; yet 'tis no Argument that they were legal or good Grants.

Have not there been in all Ages and Times, Patents and Grants, such as by Law were void and of no Force? If it be so; it is no Argument that because there have been many such Grants, therefore this is good.

But to keep my self to Monopolies.

Monopolies have been frequently in all Times granted; even in the best of Times; many by Queen *Elizabeth*. *Darcy's* was granted by her. In the Recital of it appears, that there had been granted before it, divers others of that Monopoly of sole selling and making Cards.

But when it came in Question, it was condemn'd.

Stat. 9 E. 3. c. 1. And the other Statutes before cited. The Clauses that say that all Patents granted or to be granted, contrary to the Freedom of Trade,

Trade in these Statutes mentioned,  
Prove,

1. That such Patents had been.
2. That they did foresee and provide against those that would be.

43 *Eliz. c. 1. Sect. 9.* That Proviso shews that there were Monopolies granted; but yet so far from receiving any Allowance, that that Statute made in the End of her Reign, for confirming her Patents, by special Proviso, excepts and provides,

That that Statute shall not extend to make good any Letters Patents made or granted, of and concerning Licences, Powers, or Privileges, commonly called Monopolies,

The Statute of Monopolies, and this Statute, sufficiently shew that there were such Grants, and that they were not allowed. This therefore is no Argument.

But on the contrary, it hath not, nor cannot be shewn (as I believe) that ever any had any Judicial Allowance in any Times past for any sole Trade, or sole buying or selling, which is a great Argument to the contrary. And further,

The



31 The Practice of these Companies  
hath been generally to the contrary ;  
and till within these late Years, no sole  
Trade practised amongst them.

32 This and the Charters to the Com-  
panies of *Turkey*, and the rest perhaps  
are in this particular alike (*viz.*) that  
there is in Words granted to them the  
sole Trade : But the Use and Manage-  
ment of these Charters vastly differ.

33 For the great Companies, *Turkey*,  
*Muscovy*, *Russia*, and *Hamborough* Com-  
panies, they trade not by any joynt  
Stock, but the Members of each Compa-  
ny, every Man uses his own Trade,  
buys and sells his own Commodities,  
hath his own Servants, Factors, and  
Employers.

34 They take care, by sending out Con-  
suls and Agents, to preserve the Trade ;  
and by small Imposts, maintain such  
Consuls and Agents.

35 They take care that the Market be  
not overstock'd or glutted with Com-  
modities they send out ; and therefore  
only order what Ships shall go, but  
leave to every one of the Company to  
send his Merchandize at his own Will  
and Pleasure.

They

They trade not upon any Joynt Stock, or the Stock of the Body-Politick. If you deal with any of them, you know your Chapman: No Man is refused to be free of their Companies that hath a mind, paying some small Sum for his Freedom.

But this Company of the *East-Indies*, are of quite another Nature, and use their Patent to quite another End.

The *East-India* Company trade only upon the Company's Stock: Every Man, whether Merchant or not, if he can buy such a Share in their Stock, is of their Company.

The Committee manage, and the rest must submit to their Pleasures and Distributions: Those few of them that have the most Shares, have the Disposal of the whole Stock: No Member trades, buys or sells, or hath any thing that he calls his own, but only such a Share in the Stock: No Member of theirs either buys or sells his own Merchandize, or employs any Factors or Servants. The Body Politick, the invisible Corporation trade, perhaps for 1000000 *l.* per annum. They get into their Hands, and sell perhaps 7. or 800000

800000  $\text{£}$ . worth of Merchandize at a time: The three last Sales that they made, came to 1800000  $\text{£}$ . No body hath these Commodities but they.

Is this trading, and no ingrossing or no monopolizing? 'Tis their wonderful Vertue, their Hatred and Contempt of Riches that makes them not to raise and encrease Values and Prizes, and be as rich as they please, if they do not do it. No Man is admitted to come into their Company by their Patent to have a Vote, unless he have 500  $\text{£}$ . in their Stock, which values above 1500  $\text{£}$ . to be bought: So that by the very Foundation, they can have no more Persons in their Company, than they have 500  $\text{£}$ . Shares, and these Shares being ingrossed into few Hands, the few Hands have all, and call themselves the Company.

So that Men that will not be deceived by Words, but distinguish things different one from the other, will distinguish betwixt one Company and Society, and another, who are Ingrossers and Monopolizers, and who not.

The *Turkey* Company, and the rest like it, may truly be said to be Managers, Regulators, and Improvers of Trade.

Trade. They have no joynt Stock that they trade upon ; they ingross not ; they admit every Man that will, to be free of their Companies, to trade with his own Mony, his own Credit, and buy and sell his own, and to imploy whom he pleaseth, and none amongst them, under Pretence of Government, Regulation and Preservation of Trade, makes unreasonable Advantages.

But the invisible *East-India* Merchant, the Body Politick covers and countenances some few Men amongst them, to engross, buy and sell at their own Rates, and excludes all others from the great and excessive Advantage of the few.

The other Companies, as the *Turkey*, &c. have not any sole buying or selling ; nor exercising any sole Trade or ingrossing. Every Member of these Companies, which are a Multitude, and every one that is not, may, if he will, be a Member ; no Man is excluded.

But this Company quite contrary ; and therefore if ever any was, these are great Engrossers and Monopolizers of Trade.

I do not argue or speak against Companies, nor regulating or managing Trade ( which was the true intent of this Patent ) such as I have mentioned, and is vertuously and commendably practised in the great Companies of *Turky, Muscovy, Hamborough* and others, where the Members of the Company trade upon their own particular Stocks and Estates, and no Merchant hindred or denied to be a Member, that desires it, paying his ordinary Fees of Admission.

But against the Invisible Merchant, this politick Capacity trading in joynt Stocks.

Suppose a like Patent to any one, or two or three Men, Farmers or Partners, in their private Capacity, of this sole Trade, and they had the Management of it, and thereby Possessors of such vast Wealth and Merchandize.

What would this politick Body ( I mean the principal Members ; for the Body can't think or have Sense ) judge of it ?

Perhaps yours is much worse, there a Man should know with whom he dealt, who were his Debtors, and how

to come to them ; but dealing with you is a kind of dealing with Spirits, an Invisible Body subsisting only *in intelligentia legū.*

Therefore being so unlike the other Companies, and so contrary to them, you ought to have no Countenance from them ; and though they are good and commendable, you are Ingrossers and Monopolizers.

3. But to proceed and consider the Statutes made against Monopolies.

Stat. 21 Jac. c. 3. By which 'tis enacted, ' That all Monopolies, Commissions, Charters, and Letters Patents, granted, or to be granted to any Person or Persons, Bodies politick or corporate, of or for the sole buying or selling, or using any thing within this Realm.

' And all Proclamations, Inhibitions, and Restraints, and all other matters and things, any way tending to the instituting, erecting, furthering or countenancing the same, are contrary to the Laws of this Realm, and shall be utterly void and of none effect.

' And that all Persons, Bodies politick and corporate, which now are, or hereafter

‘ hereafter shall be, shall stand and be un-  
‘ capable to have, use, exercise, and put  
‘ in use any Monopoly, or any such  
‘ Commission, Charter, Letters Patents,  
‘ Inhibitions, and Restraints ; or any  
‘ Liberty, Power, or Faculty granted  
‘ upon them.

Then follow Clauses of Forfeiture  
of treble Damages to the Party grieved  
by the using any such Monopoly.

Then the Provisoos for new Inveni-  
ons, and severall other things.

Then the Proviso concerning Cor-  
porations, which, as to this Case, is  
thus ;

‘ Provided also, and be it enacted,  
‘ that this Act shall not extend, or be  
‘ prejudicial to the City of *London*, or  
‘ other City or Towns corporate, for  
‘ or concerning any Charters granted  
‘ to them, or any Customs used within  
‘ them.

‘ Or unto any Corporations, Com-  
‘ panies, or Fellowships of any Art,  
‘ Trade, Occupation, or Mystery.

‘ Or to any Companies or Societies of  
‘ Merchants erected for the Mainte-  
‘ nance, Enlargement, or Ordering of  
‘ any Trade or Merchandize.

‘ But that the same Charters, Corporations, Companies, Fellowships, and Societies ; and their Liberties, Privileges , Powers , and Immunities, shall be and continue of like Force and Effect as they were before the making of this Act, and of none other ; any thing in this Act to the contrary notwithstanding.

The next Proviso extends to Patents, granted or to be granted for Printing, making Salt Peter, Offices, &c. which do not concern the Case in Question.

By the Description of a Monopoly, which I have before, out of my *Lord Cook*, stated and expressed; This sole Trade granted to you, and the Exclusion of all others, is a Monopoly within that Description, as I have before shewn.

That your Charter is directly contrary to the enacting Clause of this Act. For you have by your Charter granted,

Sole buying.

For all others are prohibited as much as to come or go into the *East-Indies*.

Sole



## Sole selling.

All others are prohibited to import into this Realm ; and they can't sell here unless they can import.

## Sole using.

For you have granted to you the sole Trade, which includes all buying, selling, sole using. That appropriates all to your selves, and excludes all others.

How can your Letters Patents and this Statute stand together ?

When the Statute saith, ' That all Letters Patents, granted to any Body politick, of or for the sole buying, selling, or using any thing, shall be void ;

How can yours be good ?

When the Statute saith, ' That all Inhibitions, Restraints, and other things any way tending to the instituting, erecting, furthering, or countenancing any such sole buying, selling, or trading, shall be void ;

How can yours be good ?

When the Statute saith, ' That all Bodies politick and corporate shall hereafter stand and be incapable of having, using, exercising, or putting

‘ in ure any such Charter, Inhibition,  
‘ or Restraint;

How then can the Plaintiff, in this  
Case do it?

3 Inst. 182. In the Comment upon this Statute,  
‘ tis there said, that this Act is forcibly  
and vehemently penn’d for the Suppres-  
sion of all Monopolies.

And the Words [ *Sole using* ] is  
there said to be so general, as no Mo-  
nopoly can be raised, but will be with-  
in the Reach of this Statute.

The Word [ *any thing* ] shews also  
the general Scope and Intent, that no-  
thing should be excluded that was a  
Monopoly.

*Object.* But the Proviso excepts  
Charters to Companies or Societies of  
Merchants, erected for the Mainte-  
nance, Enlargement, or Ordering of  
any Trade or Merchandize.

*Resp. 1.* This Proviso extends not  
to this Charter, or any Letters Patents  
granted after the making of that Act.  
And this appears from the penning of  
the Proviso.

The enacting Clause saith,  
‘ That all Letters Patents, granted or  
‘ to be granted for sole buying any  
‘ thing, shall be void, The

The Proviso saith,

‘ That this Act shall not extend to,  
‘ or be prejudicial to Towns Corporate  
‘ concerning any Charters granted to  
‘ them, or Customs used by them.

‘ Or to any Companies or Societies  
‘ of Merchants, erected for the Main-  
‘ tenance, Enlargement, or Ordering  
‘ of any Trade or Merchandize.

This extends to those that were granted and erected. Here is no Words of salving for any that should be hereafter granted or erected: the Words [*hereafter to be granted,*] would have been in this Clause of salving, as well as in the enacting Clause, if ever so intended. But the following Words concluding this Proviso, further shew it,

‘ That the Charters, Corporations,  
‘ Companies, Fellowships, and Socie-  
‘ ties, and their Liberties, Privileges,  
‘ Powers, and Immunities shall be and  
‘ continue as they were before the  
‘ making of this Act.

This governs and concludes the whole Proviso, and extends only to those that then were, to leave them as they were. That is,

To leave the Charters and Companies, their Powers and Privileges in the same State and Condition as they were before this Act.

The Beginning of the Proviso saith, this Act shall not prejudice them; the Conclusion saith, they shall be as they were before this Act was made.

Therefore those that were excepted, must have a Being before this Act: No Words therein extend to those that then had not a Being.

The next Proviso for Printing, Salt-Peter, Offices, &c. expressly provides for Patents granted or to be granted.

This (if so intended) would no doubt in like manner have been penn'd.

*Resp. 2.* But suppose it should be construed to extend to Companies, Privileges, and Immunities erected and granted after this Act.

Yet you are not within this saving.

1. For it extends only to Companies and Societies erected for the Maintenance, Enlargement or ordering of Trade or Merchandize, and to their Powers and Privileges that they have for that End.

Not

Not to Companies and Societies erected to have a sole Trade by a joynt Stock, or a Stock of the Corporation, excluding all others.

The *Turky* Company, *Russia* and *Hamborough*, and other Companies, that trade not as Bodies politick, or upon joynt Stocks, but every Merchant that will, may be thereof a Member, and every Member thereof trade upon his own private Stock and Account of a Merchant.

The Companies only order and consult for Maintenance and Preservation of it, and not for the ingrossing and cousening their Members of it.

These are the Corporations that are within this Exception and Proviso.

But we must be as silly as the Infidels you deal with in these Matters, not to distinguish betwixt these Corporations and their Management, and yours.

They exclude none from Trade; they trade not in a publick Capacity, in a sole Stock, but every Member is a Trader upon his own peculiar Stock.

But

But you take upon you in your politick Capacity, as you have expressed in your Declaration,

*Totum integrum & solum commercium & negotiationem habere uti & gaudere.*

And to exclude, not only all Strangers, but all your own Members to have any distinct or separate Trade upon their own account (except a little to excuse you to pay off Charges) and thereby ingross all that vast Quantity of Merchandize.

The many 100000 £. worth you bring in and carry out : In whom is the Property ?

In the Corporation.

Who buys and sells all ?

The Corporation.

Who are the Debtors for the Mony, that buys and provides these Merchandizes ?

The Body Politick, the Corporation, the invisible Body.

Who shall be sued for these Debts ?

The Body Politick.

Sue them as you can, they will either be too rich and great to contend with, or else in that Condition as you know not how or where to have them ;  
they

they are an invisible Body, subsisting only in *intelligentia legis*, a Body Politick, without Soul or Conscience, as the Law says it to be.

We have seen them in a Years time in both these Qualifications; so great as scarce any Man will contend with them; so invisible at another time, as a Dun could scarce find them.

This surely can't be for the Maintenance or Enlargement of Trade, to deal with I know not whom, where no Security or person is subject.

It is indeed for the Maintenance of the Company's Trade, to enable some of them to get 10 or 20000 *l. per Annum* by it, and to keep this vast Trade in a few Hands.

But sure this is not the Trade the Provifo intends.

Restraining to the Body Politick, which is but one Person or Man in Partnership, is quite contrary to the Enlargement in the Provifo mentioned.

And therefore, to say that you are within the saving, by this Provifo; a Company erected for the Maintenance and Enlargement of Trade, when you  
re-

restrain all but your selves to trade ,  
seems to be a Contradiction.

And for the following Words in the  
Provifo,

*[ Or ordering of any Trade or Merchandize, ]*

If you say you are saved within the  
Extent of these Words, then must you  
make a Construction of these Words in  
this Sense .

That ordering Trade and Merchandize  
is excluding all others, and taking  
the whole to your selves.

A most excellent ordering indeed.

But the true Sense of these Words in  
this Provifo, is to save the Corporations  
and Fellowships of Arts, Trades,  
Occupations, and Mysteries, and to  
Companies of Merchants, the Powers  
and Authorities that they had for the  
Maintenance, Enlargement, or ordering  
of Trade.

By taking care that the Commodities  
were honestly and rightly made,  
without Fraud or Deceit in their Measures  
or Quantities.

That the Servants and younger sort  
were honest, and industriously educated  
in their Trades and Mysteries, by  
the Masters and elder sort. To



To place and keep good Order and Decorum amongst those of the same Myſtery and Trade.

For aſſembling and conſulting for the common Good, and Management of their reſpective Trades and Employments.

This is that which the Proviſo excepts and provides for.

Not for a ſole Trade in a Company, in a joynt Stock, excluding all others as this is.

The Company there made a By-Law, to exclude Taylors from uſing their Trades within that Town, unleſs by the Maſters and Wardens of the Company, or three of them admitted to be a ſufficient Workman.

Taylorſ of  
Ipswich  
Caſe, 11  
Rep. 54.

In this Caſe here ſeemed to be a good End and Meaning, to exclude inſufficient Workmen, and encourage good Workmen; a good Order one might think.

Yet ſo jealous and careful they then were, leſt, under any Pretence they ſhould exclude Men from their lawful Trades that they adjudged this a void By-Law, as tending to reſtrain Men of their Freedom in uſing their Trades,

Trades; and introducing Oppression of the young Tradesmen, by the old and rich Tradesmen.

And in that Case adjudged,

That Ordinances for the good Order and Government of Men of Trades and Mysteries are good, but not to restrain Men in their lawful Mystery.

To the same purpose is *Norris and Stop's Case*, *Hob. 211.*

So that this being the Sense of this Proviso, to except Powers and Authorities that Companies have to regulate Trade, for the Maintenance and Enlargement of it, but not to restrain any from their Trades or lawful Mysteries, it extends not to salve or preserve such Authority or Power in you to have a sole Trade, excluding all others.

2. For another reason, it cannot be the Sense of this Proviso, to except or save to any Body Politick, the buying in their publick Capacity, a sole Trade.

The Proviso then will be repugnant and contradictory to the enacting Clauses. For taking the Proviso as they would have it ;

To

To save to Bodies Politick the having the sole buying and selling, and using any Merchandize or Trade as a Corporation, and then compare the Proviso with the enacting Clause, and it will be just thus,

Enacted, That Letters Patents to any Body Politick, for sole buying, selling, or using any thing, shall be void. And that no Body Politick shall be capable of having, using, or exercising any such Patent, Inhibition, or Restraint.

Provided that Bodies Politick may have the sole buying, selling, and using any Trade:

Is not this in plain *English*, repugnant and contradictory? Examine it as much as you can, and it will be no other than a down-right Contradiction.

Suppose the Statute that enacts, that no Man shall use a Trade that he hath not served an Apprentice to, by the Space of seven Years, had a Proviso,

That Men might use a Trade that they had not served an Apprentice to by the Space of seven Years.

This

This had ben a void repugnant Proviso.

This is as plainly repugnant,

That no Body Politick shall be capable of having a sole Trade,

Provided that a Body may have a sole Trade.

And repugnant Provisos are in Law void.

1 Rep. 46.  
Pl. Com.  
563.

Statute gives the Land of J. S. to the King : Then a Proviso comes to save the Right of all Persons.

This shall be construed, all Persons besides J. S. not to destroy the Premises.

Therefore when the Act saith,  
' That all Patents granted to Bodies  
' Politick for sole buying and selling or  
' using any thing, &c.

Shall the Proviso that saith, That it shall not extend or be prejudicial to Companies of Merchants erected for the Maintenance, Enlargement, or ordering of Trade,

If construed in the same Sense that they would have it, to give the Companies sole buying, selling, and using any thing as Companies in their Corporate Capacity, it is repugnant and contradictory.

But

But to give the Companies the Management, Order, and Government, is the Sense as I conceive.

And this is the general Practice of the Societies and Companies allowed in all times.

But a sole Trade, under the Colour and Pretence of Order and Management, never, as I believe, hath had any judicial Allowance.

*Object.* Another thing that the Counsel of the other side, have objected to evade this Act, hath been this. The Proviso is;

That the Act shall not extend to Companies of Merchants, erected for Maintenance and Ordering of Trade, but that their Charters, Liberties, and Privileges shall be of like Force as they were before the making this Act.

And therefore, say they, Patents to Companies of Merchants for ordering Trade, if good before this Act, shall be good still; and therefore, say they, the Act can't hurt us.

This is curious, but if examined, is but the same Objection in other Words.

For the Conclusion of this Proviso extends no further than the Charters mentioned in the Beginning of it : It extends but to the same Charters; so are the very Words.

What Charters or Patents then shall remain in the same Force they were before the Act?

Those that are excepted.

What are excepted?

Those that are for Order and Management; as I have before shewn.

Not those that are for sole Trade granted to a Body Politick. That is repugnant to the enacting Clause; therefore those (as I have said) are not excepted or within the Proviso.

If then not excepted, you are most plainly and fully within the enacting Clause, and your Patent quite contrary to, and void by this Act; unless the matter of Infidel will save you.

*Object.* But this is a sole Trade with Infidels, and such a Trade the Subject had never any Right to have without the King's Licence. And to prove it, they cite *Michelburne's Case*.

Wherein Mr. *Brownlow* being Prothonotary, doth relate what my Lord

*Coke*

Coke said, That no Subject of the King might trade with any Realm of Infidels, without the King's Licence.

And that the Reason was because he might relinquish the Catholick Faith, and adhere to Infidelism: And that he had seen a Licence in the Time of E. 3. where the King recited the Confidence that he had in his Subject, that he would not decline his Religion; and so licenced him.

And that this did arise upon the Recital of a Licence made to trade to the East-Indies.

They cite also *Calvin's Case*, 7 Rep. 17. where 'tis said, That Infidels are *perpetui inimici*; there is perpetual Hostility, there can be no Peace; an Infidel can maintain no Action, nor have any thing within this Realm; and to prove this there is cited, R. 282.12 H. 8.4.

1. Supposing the Law to be as these Books intend, and as the other side urge them, and the Consequence will be, that the Plaintiff can't maintain this Action, but that the Charter granted to them, is void.

The Reason that is given in *Michellburn's Case* is grounded upon this: That

the King hath the Care and Preservation of Religion by the Law vested in him : That his Subjects shall not trade with Infidels, lest thereby they may be brought to relinquish the Catholick Faith, and adhere to Infidelism : And that the King shall take care, that Licences to trade be only given to such as the King hath Confidence in, that they will not decline their Religion.

Supposing this, then your Patent must be naught, for then it is only grantable to Persons in whom such Confidence may be.

Your Corporation or Body Politick is indefinite as to Persons ; the Members thereof are daily changeable ; some go out, sell their Stocks, or dye ; others buy their Stocks, and are daily coming in to be Members of your Company.

I doubt you do not much examine, nor care how fixed or certain those are in Religion, that come into your Company.

How then can there be any Confidence in a Body Politick ?

The Law saith, that a Body Politick hath neither Soul nor Conscience :

What



What Confidence then concerning their Religion can there be in a Body Politick?

2. 'Tis not only the Members of the Company that were at the Time of the Corporation, but those that after should be Members, and their Sons, their Apprentices, Factors, and Servants that are licensed by this Patent.

If licensing to trade with Infidels be a Trust and Prerogative in the King, to be given to such Persons in whom the King can have Confidence, that they will not be conversing with Infidels, change or prejudice;

This can't be granted to a Body Politick and their Successors, which may have Continuance for ever; or to their Sons, Factors, Apprentices, and Servants, Persons altogether unknown; not born, nor *in rerum natura*, when the Patent was made.

Suppose such a Licence to you to trade with Enemies. I say,

3. Supposing it to be in the King's Prerogative, in Preservation of Religion to licence; yet he can't grant this Prerogative to you, that you shall have Power to grant Licence to whom you will.

g Yet all this is done by your Patent ; for you have not only thereby Power granted you for your Apprentices, Factors and Servants, which are Persons that you your selves nominate and appoint at your Discretions ; and undoubtedly very religious :

21 But by your Patent it is expressly granted, that the Company, for any Consideration or Benefit to themselves, may grant Licences to any Merchant, Stranger, or other, to trade to or from the *Indies* :

And that the King will not, without the Consent of the Company, licence any other to trade.

Can this be a good Grant ? Can the King grant from himself his Kingly Care and Trust for Preservation of Religion, to you, that you shall manage it, and that the King will not use such his Power without your Consent ?

So that supposing that there is, by the Law, such a Trust reposed in the King, for Preservation of Religion, as you would have it ; yet the Grant to you is void in it self, and then you have no more Right than we, and consequently can maintain no Action against us.

2. To consider the Books that you have cited to maintain this religious Point.

1. *Brownlow's Reports*, a Book printed in the late Times, not licensed by any Judge or Person whatsoever.

The Roll is, *Michellburn* against *Ba-  
thurst*, setting forth, that the King had granted the Pleinriff his Commission to go with his Ship *Tiger*, to the *East-Indies*, to spoil and suppress the Infidels, and to take from them what he could. That there were Articles betwixt the Parties for Account and Shares of what should be got, and upon those Articles a Suit in the Admiralty.

Mich. 7.  
Jac. B. C.  
Rot. 3107.

And what is it that is in the Case? Nothing to the purpose; but the Book mentions only what my Lord *Coke* said upon the Motion for the Prohibition: Only a sudden occasional Saying, not upon any Argument or Debate, nor to the then Case.

So that a Man must be very willing that will much rely upon such a Saying, I can't call it an Authority.

2. For *Calwin's Case*;

That an Infidel is *perpetuus Inimicus*, and can maintain no Action, or have

any thing, and that we are in perpetual Hostility, and no Peace can be made with them.

It is true, that this is said in *Calvin's* Case; but there was nothing there in Judgment that gave Occasion for it, so that I can't think that it was much considered before it was spoken.

The Books there cited to prove it are, *Reg. 289*. And all that I can find therein, is, that in a Writ of Protection granted to the Hospitallers of the Hospital of St. John's of Jerusalem, it is said, that the Hospital was founded in Defence of Holy Church against the Enemies of Christ and Christians.

But doth this prove, that Infidels are perpetual Inimici, with whom no Peace can be made, that can maintain no Action?

The other Book cited is, *12 H. 8. 4*. Trespass brought for taking away a Dog, and in the debating whether this Action did lye or not; it is said,

That if the Lord beat his Villain, an Husband his Wife, or a Man outlawed, or a Traitor, or a Pagan, they shall have no Action, because they are not able to sue an Action.

So that this also is but Discourse and sudden Thoughts and Sayings, where the thing was not in Question: And what Authority is there in such Sayings? It is true, that Christian Religion and Paganism are so contrary one to the other, as impossible to be reconciled, no more than Contradictions can be reconciled.

But because they can't be reconciled that therefore there should be perpetual War betwixt them and us, perhaps is an irreligious Doctrine, and destroys all Means of convincing Infidels to the Faith.

And besides, these extrajudicial and occasional Sayings in these Books cited, are of little Authority: For I can't find any Book or Case, much less Judgment or Authority for such Opinions in so great a Point as this is.

But on the other side, if a Man considers the general Course and Practice, Trade and Commerce, and legal Proceedings; a Man would think, That my Lord Coke could not be in earnest in what he hath said about Infidels.

For let a Man consider what a great Part of the World we have Commerce with,

with, that are Infidels, as *Turks, Persians, the Inhabitants of Barbary, and other Countries.*

*Spain and Portugal* were also possessed by the *Moors*, who were Infidels, till about the Year 1474. about 200 Years since they were driven out, for till then, for near the Space of 700 Years the *Moors* possessed both *Spain and Portugal.*

Have we not Leagues and Treaties with the Princes and Inhabitants of the Infidel Countries, receiving Ambassadors from them, and sending Ambassadors to them, and Ministers always residing with them? Have we not from Time to Time, Peace or War with them in like manner, as with Christian Kings and Countries?

If Infidels be *perpetui Inimici*, if in perpetual Enmity, then we may justify the killing of them, as those that we are in Hostility with, wheresoever we meet with them.

17 E. 4. 13. b. 2 H. 7. 15. Adjudged that any Man may seize and take to his own Use, the Goods of an alien Enemy.

'Tis

'Tis the Price of his Adventure and Victory over his Enemy.

If an Infidel be any Enemy, any Man may then take away the Goods of an Infidel, and have them to his own Use : And this would be a good Trade if this be so.

Mr. Solicitor, in his Argument, was pleased to cite many ancient Rolls out of H. 2. and E. 1. and about those Times, concerning those Princes handling the Jews.

In Mr. Pryn's Book that he calls *The second Part of a short Demurre to the Jews long discontinued Remitter into England*; printed in 1656.

In which Book, I believe, an hundred Records and Histories are cited to shew how they were about those times handled.

The Time that they did exact, and much enrich themselves by Usury, to the great Impoverishment of the People : And that the Princes of those Times polled them, taxed them, and took it from them again at Pleasure.

But besides Mr. Pryn,

Stat. of Merton, C. 5. made 20 H. 7. was, my Lord Coke saith, principally in-  
Inst. 89.

intended against the usurious Jews.

Stat. *de Judaismo* 18 E. 1. Recites, that the King's People were disinherited by the usurious Jews: And enacts, That no Jew, for the future, shall take Usury.

a Inst. 507.

My Lord Coke saith, that 15060 Jews thereupon departed the Kingdom.

But for the Use that in arguing is made of this matter of the Jews and of the King's seizing their Estates, and pardoning for dealing with them.

1. As for those ancient Records in general,

Time hath hidden the Knowledge of the Laws, and Transactions of those Times: It is impossible to know what the Laws of those Times were, or rightly to distinguish betwixt legal and violent Acts: And to bring Inferences from thence, to conclude in Judgment now, is *Notum per Ignotius*: Or like Dependencies, which, unless latter Times have concurred or agreed with, are only fit to make Disorder and Confusion.

2. But that which is deducible from thence is not, as I conceive, what hath been endeavoured. That



That is, that they had no Property, because the Princes of those Times took from them their Estates when they pleased, or taxed them how, and in what manner they pleased.

But perhaps the Reason was because those People lying under the Curse, and being a vagrant People, without Head, Prince, or Governour, or Country; it was no Difficulty to tax, or take from them at Pleasure, being hated of the People where they lived.

For it could not be as they would have it, that they should be amongst us as alien Enemies; for an alien Enemy can make neither Bargain nor Contract, nor be capable of Property.

But the Subject may, at his Will and Pleasure, fall upon and take all that he hath to his own Use, as upon the King's Enemies; and what he can take from him is his own Acquisition, as the Prize of his Adventure, and Conquest over his Enemy: And to prove this, two Books are cited, 17 E. 4. and 2 H. 7.

But

But by what is admitted by them, that they were great Usurers, and had great Estates,

It is evident that they were treated as alien Amies : How could they else, in such Multitudes, live amongst us? How could they be Usurers or get Estates if they could not make Contracts? How is it possible they could preserve their Bodies or Estates against the King's Subjects, unless they had the King's Protection, and treated as alien Amies?

And of latter Times, how many of them have lived amongst us, driven great Trades, have had, and have, at this present, considerable Estates?

Let it be now adjudged, that any Man that will, may take away their Estates, that they can have no Remedy or Action for any Debt owing to them, but instead thereof, may be beaten and imprisoned as Enemies to the King: And we shall probably see what the Success of such a Judgment will be.

The Act of Navigation, made the 12 Car. 2. 12 Year of the King, concerning Trade, shews, that Infidels have the same Liberty of Trade as others. That

That Act being made for Increase of Shipping and Navigation, and prohibiting Goods to be imported by any foreign Ships, except the Ships of the same Country where the Goods do grow or arise, distinguisheth not betwixt Infidel and Christian Countries: But expressly saith, ' That Currants, nor Commodities of the Growth of the *Turkish* or *Ottoman* Empire, shall be imported but by *English* Ships, except Ships of the Built of that Country or Place where the Growth is, and whereof the Master of the Mariners is of that Country or Place.

This Clause shews plainly, that the Infidels of the *Turkish* and *Ottoman* Empire have Liberty of Trade here.

And the Acts of Tunnage and Poundage tax all their Merchandizes without saying brought in.

In *Southern & How's* Case, 2 Cr. 469. where a Man imployed another to sell Jewels for him in *Barbary*, as true Jewels, and he sold them to the King of *Barbary* for 800 l. as true Jewels, when they were counterfeit, and thereupon the King of *Barbary* finding himself cheated, imprisoned the Plaintiff that sold them,

to him, till he repaid his Money

In that Case 'twas of all sides admitted, and not as much as objected, that this Contract was void, because the King of *Barbary* was an Infidel.

So that this Opinion, that Infidels are perpetual Enemies, and in perpetual Hostility, can maintain no Action, nor have any thing amongst us, hath no Authority for its Foundation, but only some extrajudicial Sayings, without Debate or Consideration: And is against all the continual Practices of Princes and People at all Times.

Perhaps 'tis no small Part of Religion, that Men should speak and deal plainly and uprightly one with another. We do know that Religion hath been too often made a Cloak and Vail for other Ends and Purposes. It should not be so: And I hope, will not be so used in this Case.

The Statutes that I have cited of *Magna Charta*, c. 9. E. 3. 25 E. 3. 2. and 11 R. 2. All declare and enact the Freedom of Trade in general Words, except only such as are in War with the King. In none of them is there any Exception of Trade with Infidels.

Can

Can it be imagined, that in those Days we had no Trade with *Turkey* or *Barbary*? Our Kings went with Armies to the Holy Land. King had made War and Peace with the *Turks*. Had we no Trade there but with our Swords?

But to look nearer home, *Spain* and *Portugal* were Infidels, and in the Hands of the *Moors*, until anno 1474. which was 14 E. 4. Can it be thought that in all those Times betwixt *Magna Charta*, H. 3. and E. 4. we had no Trade with *Spain* or *Portugal*?

Stat. 12 H. 7. c. 6. was made in the Year 1497. which is but 23 Years after the *Moors* were driven out, and in that Statute 'tis Recited,

' That the Merchants Adventurers,  
' dwelling in divers Parts of *England*,  
' out of *London*, did shew,

' That whereas they have had free  
' Passage, Course and Recourse with  
' their Goods, Wares, and Merchandizes in divers Coasts and Parts beyond the Seas, as well into *Spain*,  
' *Portugal*, *Venice*, *Danzick*, *East-land*,  
' *Frise-Land*, and divers, and many  
' other Regions and Countries in  
E 'League

• League and Amity with the King ;  
 • That they were imposed upon by  
 • the Company of Merchants in *Lon-*  
 • *don*, and forced to pay Duties.

I only make use of this Recital, to prove the free Passage there mentioned, to *Spain* and *Portugal*, and to other Countries and Regions. There is no Distinction of Infidel from Christian Country, though *Spain* and *Portugal* had been so lately Infidel ; and though most probably, the Trade they had then, was with *Turkey* and *Barbary*, as well as with *Venice* : The Words [ *other Regions and Countries*, ] seem to imply as much, and the Freedom equal.

So that I think, as to this Objection, that Infidels are perpetual Enemies, that we have no Peace with them, nor they maintain any Action, or have any Property by our Law ; I think the Authority to maintain it is none at all ; The constant Practice, as well by Princes as People, has been always against it.

But be that Point of trading with or without Licence, how it will ;

That

That Point can't be sufficient to found a Monopoly upon, that can't warrant a Grant of a sole Trade, sole buying, and sole selling, to be granted to you and your Successors, your Sons, your Servants, your Apprentices and Factors, and such as you shall license for ever.

Here is a Licence in Perpetuity, not only to those that then were, but to their Sons and Successors, and those whom they shall license for ever: And this into a very great Part of the World: And by the same Reason all *Turkey* and *Barbary*, a great Part of the *West-Indies*, and other Parts of the World may be monopolized, and perhaps all Christian Countries.

The Statute of Monopolies hath no Allowance or Exception for monopolizing to Infidel Countries.

That Statute is against all sole buying, sole selling, or sole using any thing.

And the *Turkey* Trade was used long before that Time, as by the Charter granted 23 *Eliz.* So was the *Barbary*, as by the Charter thereof; and I believe to the *Indies* also.

And the Statute of Monopolies being so general ( the Provifo not reasonably conftruable, to except this Company out of the Extent of that Statute, unlefs all Patents that may be granted to Companies of Monopolies are, by that Exception or Provifo, out of the Statute ) and deferving for the fuppreffing fo great Evils as Monopolies are, and always have been accounted:

I hope it will not be avoided upon an imaginary Difference in Law betwixt Infidel and Christian Countries, to monopolize thereby the Trade, perhaps, of the greater Half of the World; as *Turkey, Perfia, Barbary, East and Weft-Indies*; for thofe of the *Weft-Indies*, a great Part, I think, are Pagans.

Exch. 4. C. In the great Debates that were  
 1. Lane 24. about 3 and 4 *Car. 1.* about the King's  
 2. Inft. 63. Power of impofing Rates, Subfidies, or Impositions upon Merchandize, in *Bates* his Cafe; and in the Parliaments are many things faid concerning the King's Power of prohibiting Trade.

Reftaining by a *Ne exeat Regno*. And from thefe Arguments they reafon the



the Lawfulness of Imposition upon Merchandize.

The Arguments and Reasons in those Debates did not distinguish betwixt Infidel and Christian Countries. But betwixt Native and Foreign Commodities or Merchandize : And did endeavour to have a Prerogative to tax foreign Commodities.

And their Reasons run thus,

The King can prohibit or restrain any Merchant to go out of the Kingdom : He can restrain any sort of foreign Commodities to be imported : If he can restrain, then none can go or import contrary to such Restriction or Prohibition without Licence. Then the Licence is grantable upon Payment of such or such Duty or Imposition, or as it can be agreed for and had ; and consequently such Imposition, Farm, or Rent lawful.

And in the Argument of those Matters, it appears that a Restraint in its Consequence may import a Tax, or an Imposition, or Rent or Farm.

If Licences be requisite, whether that will introduce Rates to be imposed

otherwise than by Act of Parliament, may be considered.

Suppose it true, that there have been Licences granted, to go into Infidel Countries. So there have been to go beyond Seas.

But it is no Consequence, that because such have been granted, that therefore it is unlawful to go or trade without Licences.

Much less doth it follow from thence, that such a Patent as this to any one or few Subjects to have the whole and sole Trade into any one Place, can be warranted.

I do not question but the King may restrain the Passage of Merchants and Merchandize in some Cases, and Embargue Ships in some Cases. But these are upon several Reasons.

1. In Cases of War.
2. In Cases of such Merchandizes as are necessary for the Safety or Defence of the Kingdom, to restrain their Exportation.
3. In Cases of Plague from particular Place to import.

But then these Prohibitions are general, and their particular Reasons and Grounds are apparent, But

But if under any Pretence, any sole Trade to some one Person, Body-politick, or Natural, be granted, excluding all others, That Grant is, I conceive, in Deceit of the King, and to the Prejudice of his Subjects, and void.

Never any such Grant hath hitherto had any judicial Allowance; but so far from that, that as far as I could observe, no Opinion hath been, till within 4 or 5 Years, that such Grants were good to exclude others: Nor any Action or Suit ever adventured before now to be brought upon any such Ground.

But if the Law should be so, and that the Defendant ought not to have traded there without License,

Then he may be punishable at the King's Suit, by Fine and Imprisonment.

But that you should maintain an Action against him; what Cause of Action, or what Damage or Loss to you have you laid in your Declaration?

You say in your Declaration, ' That the Defendant *Sands*, not being a Member of the Company, nor Son, Servant, Factor, Apprentice, or Assignee

'signee of the Company, traded and mer-  
 'chandized in the *East-Indies*, within  
 'the Places granted to you by your  
 'Charter, and hath there bargained  
 'and sold Wares and Merchandizes,  
 'and there bought others, and import-  
 'ed and sold them in *England*, against  
 'the Will of the Company, to their  
 'Prejudice and Impoverishment, a-  
 'gainst the Form of the Letters Pa-  
 'tents, to the Damage of the Compa-  
 'ny, 1000 l.

1. You have not alledged that he had no License from the King.

2. You have not shewn any Loss or Damage that you have.

Did he buy so much Merchandize in the *Indies*, as that he left not there sufficient for you to furnish your Ships withall, so that they came home empty?

No such thing is alledged.

Or did he here export, to sell so much Merchandize, as not sufficient left for you to buy here?

No such thing alledged in your Declaration.

Or did he bring home here so much as that there were not Buyers sufficient

sufficient for his Goods and your's also?

No such thing is alledged.

Or is the Truth so, as that hereby your imposing your Prizes upon your own Commodities, selling at your own Rates, and exacting what you thought fit, was hindred ; and for this you would maintain an Action?

It will be the first Time, I think, that a Man did ever recover Damages for being hindred of imposing and exacting his own Prizes, or having the Advantage of his Monopoly.

A Commoner may bring an Action of the Case against a Stranger, who puts in his Cattel into the Common ; provided that thereby the Common be impaired, and the Commoner have not sufficient Common, as before, but have a Damage ; otherwise he can maintain no Action.

Resolved, that for every feeding of the Beasts of a Stranger in a Common, <sup>Co. 9 Rep</sup> <sup>113.</sup> the Commoner shall not have an Assize or Action upon the Case, but the feeding ought to be such, that thereby the Commoner cannot have Common of Pasture for his own Beasts.

'Tis

'Tis the Consequence, the Loss of his Common that gives him Cause of Action.

'Tis not alledged in the Declaration, that your Trade was any thing the worse: No Damage to you appears by it.

What Reason is there that you should recover Damages where you have not sustained any Loss? And if you have alledged none in your Declaration, how can your Declaration be good? It then contains no Cause of Action.

The last Point in that Case is there resolved, that admitting the Patent good, yet no Action would lye.

11 Co. Rep.  
88. b. Rols  
Abr. 1  
part. 106.

In that Case the Queen, by her Letters Patents, had granted to Mr. Darcy, that he, his Servants, Factors, and Deputies, the whole Trade, Traffick and Merchandize of Cards for 12 Years should have and use; That none else should use the Trade, nor buy or sell Cards: That the Defendant did, contrary to this Patent sell Cards.

1. Adjudged that this was a Monopoly, and the Patent void.

2. That if the Patent had been good

good, yet no Action would have lyen against the Defendant upon it.

2. But for another Reason you can't maintain this Action.

It is grounded upon the Restraint and Prohibition of others to trade, contained in the Letters Patents.

That Restraint or Prohibition is not an absolute Restraint or Prohibition, but *sub modo*, under a Pain of Forfeiture of Ship and Goods; One half to the King, another half to you that are the Company.

Now supposing all that you can desire; That this Patent should have the Force and Vertue of an Act of Parliament, yet such an Action as this could not be maintained upon it; but you must sue for the Forfeiture.

For whensoever a new Law is made, you must take that new Law as it is, and it can't be extended.

Co. 7 Rep. 37. 11 Rep. 59. and Pl. Com. 206. All prove it.

Stat. E. 6. gives treble Damages for not setting out of Tithes.

Can the Party wave this Way, and bring an Action of the Case? Yet here the Damages are given to the Party.

The

The like of all other penal Statutes ; a Man must forfeit only the Penalty the Statute inflicts.

So that this Action cannot, as I conceive, be maintained.

So that to conclude :

1. That which this Company claims in this Case by this Patent, to have the sole Trade to the *East-Indies* in their Politick Capacity, excluding all others, is a Monopoly and ingrossing against the common Law; the ancient Statutes; the Statute of Monopolies 21 *Jac.*

And therefore they have no Right to have what they claim.

2. That what the Defendant hath in this Case done, he hath lawfully done, and therefore not to be punished.

3. That though the Company had a lawful Claim to the Trade in such manner as in their Declaration set forth, and the Defendant have done what he ought not, yet they can't maintain this Action.

And upon the whole matter, Whether best for the Company to have  
Judg-



Judgment for them or against them,  
may deserve their Thoughts.

And this being so great in the Con-  
sequence, as the whole Trade of the  
Kingdom depending upon it, I have  
laboured the more.

The ancient Laws, the ancient  
Ways, is what I endeavour, and  
against new Ways upon any Pretence  
whatsoever.

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